85-1871

Supreme Court, U.S.
FILED
MAY 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1985, Term

RICKEY E. MITCHELL,

Petitioner-Appellant,

V.

W. J. MICHAEL CODY, ATTORNEY GENERAL OF THE STATE OF TENNESSEE, ET AL,

Respondents-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Charles G. Black,
Attorney for Petitioner
2901, 100 North Main Building
Memphis, Tennessee 38103
(901) 525-4618

5 TPP

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

This case originated in the Municipal Court of Memphis, Tennessee where Defendant pled guilty to charges of driving while intoxicated and related charges. Ten days following his guilty plea in the Municipal Court, Lawrence John Pleasants died as a result of Petitioner's driving. Petitioner was then indicted by the Shelby County, Tennessee Grand Jury for vehicular homicide. Petitioner's motion to dismiss indictment claiming former jeopardy was dismissed by Trial Court. Interlocutory appeal, by permission, to the Tennessee Court of Appeals was granted. The Court of Appeals, in a two-to-one decision, dismissed the indictment, stating that to indict

Petitioner for vehicular homicide after Petitioner pled guilty to driving while intoxicated, violated the Federal and State Constitutions; Supreme Court of Tennessee granted the State's Application for Permission to Appeal, and in a unanimous opinion, the Supreme Court reversed the Court of Appeals and remanded the cause to the Criminal Court of Shelby County, Tennessee for trial.

Petitioner-Appellant then filed his Petition for a Writ of Habeas Corpus in the United States District Court for the Western District of Tennessee, insisting that to try Petitioner for vehicular homicide after he had been sentenced for the offense of driving while intoxicated and related charges violated the former jeopardy provisions of the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States of

America and Article 1, Section 10, of the Constitution of the State of Tennessee.

The United States District Court for the Western District of Tennessee denied Petitioner-Appellant's Application for Writ of Habeas Corpus And For Stay of Proceedings, which opinion was affirmed by the Sixth Circuit Court of Appeals; thus, this Application for Writ of Certiorari.

-oOo-

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Authorities	v
Opinions Below	ix
Jurisdiction	x
Reasons Relied on for Seeking This Writ of Certiorari	xi
Statement of the Case	2
Argument	15
Conclusion	32
Certificate of Service	34
Addendum - Per curiam opinion of the United States Court of Appeals for the Sixth Circuit	

TABLE OF AUTHORITIES

CASES:	PAGE(S)
Ashe v. Swenson, 397 U.S. 436; 25 L.Ed. 469 90 S.Ct. 1189 (1970)	21
Blackledge v. Perry, 417 U.S. 21; 40 L.Ed. 628 94 S.Ct. 2098 (1974)	25
Diaz v. U.S., 223 U.S. 442 (1912)	19,28
Hulberson v. Wainwright, 453 F.2d 1219 (5th Cir. 1972) 407 U.S. 913, 92 S.Ct. 2449; 32 L.Ed. 2d 688 (1972)	18
Jeffers v. U.S., 432 U.S. 137; 150 97 S.Ct. 2207; 53 L.Ed. 2d 168 (1977)	28
Robinson v. Neil, 366 F.Supp. 924 (E.D. TN '73) .	16,20 21,22

CASES:	PAGE(S)
State of New Jersey v. Dively, 458 Atl. Reptr., 2nd Ser. p. 502 (1983)	20-22
State of New Mexico v. Fugate, 678 P.2d 687 (March 1, 1984)	25
State of Tennessee v. McKenney 605 S.W.2d 842 (S.Ct. TN 1980)	15
Thigpen v. Roberts, 468 U.S. --, 82 L.Ed. 2d 23; 104 S.Ct. --, ...	21,23
U.S. v. Engle, 458 F.2d 1025 (6th Cir. 1972)	17
U.S. v. Vitale, 447 U.S. 410; 100 S.Ct. 2260; 65 L.Ed. 2d 228	21,24
Waller v. Florida, 397 U.S. 387; 90 S.Ct. 1184; 25 L.Ed. 435 (1970) . . .	17,21

STATUTES AND RULES CITED

	PAGE(S)
Title 28, United States Code Annotated, Sec. 2241	viii, 2,14
Tennessee Code Annotated, Section 39-2-231	6,7,8
Tennessee Code Annotated, Section 39-2-232	8
Tennessee Code Annotated, Section 55-10-401	3,15
Rule 17 of Rules of Supreme Court	ix
Rules 19, 20, and 21 of the Rules of the Supreme Court of the United States	viii
Rule 9 of Tennessee Rules of Appellate Procedure	11
Article 1, Section 10 of the Constitution of the State of Tennessee	viii, 7,10,13

PAGE(S)

UNITED STATES CONSTITUTION:

Fifth Amendment . . . . . ii, viii, 7,9,13,31

Sixth Amendment ii,31

Fourteenth Amendment. . . . . ii,viii 7,10,13

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Sixth Circuit in this case is reported in 783 F.2d 669; Argued January 19, 1986; Decided February 18, 1986. The text of this opinion is attached as an addendum and also is quoted verbatim in the Appendix, as well as the Orders of the Criminal Court of Shelby County, Tennessee, The Court of Appeals of the State of Tennessee, The Supreme Court of Tennessee, and the Opinion of the United States District Court for the Western District of Tennessee.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on February 18, 1986, and this Petition for Writ of Certiorari was filed within ninety days of that date.

The application for writ of habeas corpus filed herein was brought pursuant to Title 28, United States Code Annotated, Section 2241.

This Court's jurisdiction is invoked pursuant to Amendments 5 and 14 to the Constitution of The United States of America; Article 1, Section 10, of the Constitution of the State of Tennessee, which statutes are recited verbatim in the Appendix; and also in Rules 19, 20 and 21 of Rules of the Supreme Court of the United States.

REASONS RELIED ON FOR SEEKING THIS WRIT OF CERTIORARI

Rule 17 of the rules of the Supreme Court states that a review on Writ of Certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner submits that this case has "special and important reasons" for granting this writ.

Further, Rule 17.1, in part, states:

> "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned

> such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * *
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

Your Petitioner would show that the facts in the instant case is a case of first impression in the State of Tennessee and that several Federal Court of Appeals have decided a federal question in a way in conflict with the Supreme Court of the State of Tennessee and that this important question of federal law should be settled by this Court as Petitioner

earnestly submits that to place him in jeopardy of the offense of vehicular homicide, after he has waived his right to a jury trial and pled guilty, denies him his rights under the Constitution of the United States of America and the State of Tennessee.

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1985, Term

RICKEY E. MITCHELL,

Petitioner-Appellant,

V.

W. J. MICHAEL CODY, ATTORNEY GENERAL OF THE STATE OF TENNESSEE, ET AL,

Respondents-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Charles G. Black,
Attorney for Petitioner
2901, 100 North Main Building
Memphis, Tennessee 38103
(901) 525-4618

STATEMENT OF THE CASE

The parties hereto will be referred to as they were in the Sixth Circuit Court of Appeals, with Appellant as Petitioner or by name (Mitchell) and the Appellees as The Government or Respondents.

This action is brought pursuant to the provisions of Title 28, United States Code Annotated, Section 2241, and other laws and statutes of the United States and the laws and statutes of the State of Tennessee.

The Petitioner's full name is Rickey E. Mitchell, an adult citizen of Memphis, Shelby County, Tennessee.

At about 9:45 o'clock on the evening of February 20, 1982, Petitioner was driving his 1981 Chevrolet pick-up truck eastwardly on Chickasaw Road in Memphis,

Tennessee, when he collided with a 1980 Datsun automobile being driven by Lawrence John Pleasants southwardly on Mendenhall Road in Memphis, Tennessee.

On the evening of the accident, the Petitioner was administered an intoximeter test, which test revealed that he had .12 percentage of alcohol in his bloodstream. Ten (10) percentage points of alcohol in the bloodstream of persons in Tennessee raises a presumption of intoxication.

Two days following the accident, to-wit, February 22, 1982, Petitioner was charged with violating Tennessee Code Annotated, Section 55-10-401, for driving a vehicle while under the influence of an intoxicant or drugs and was placed on Docket Number 82-052500 of the Municipal Court of Memphis,

Tennessee. He was also charged with reckless driving and disregarding a stop sign.

On February 22, 1982, Petitioner waived his right to a jury trial and entered a guilty plea to driving while intoxicated and unlawful possession of a controlled substance and was fined $300.00 for driving while intoxicated, plus state costs, $250.00 fine for possession of a controlled substance, and he was sentenced to 60 days in jail, 58 days of which were suspended. He was placed on supervised probation for 11 months and 29 days, and his driver's license was revoked for six months. The reckless driving charge was dismissed.

On March 2, 1982, Lawrence John Pleasants died as a result of the injuries sustained in the accident.

It was stipulated between the State of Tennessee and the Petitioner that the criminal charges against the Petitioner in the Municipal Court of Memphis, Tennessee, Number 82-052500, were the same criminal charges that resulted in the indictment in this cause that caused the death of Lawrence John Pleasants, who died ten days following the Petitioner's sentence in the Municipal Court of Memphis, Tennessee.

On June 15, 1982, the Petitioner was indicted by the Shelby County, Tennessee, Grand Jury charging that the Petitioner did unlawfully and feloniously kill Lawrence John Pleasants by the operation of a motor vehicle, to-wit, a pick-up truck, the killing of the aforesaid Lawrence John Pleasants being the proximate

result of the said Rickey E. Mitchell's intoxication as operator of the aforesaid automobile, as alleged in the First Count of the indictment, in violation of Tennessee Code Annotated, Section 39-2-231 (b). The Second Count of the indictment charges that the Petitioner did operate a motor vehicle, to-wit, a pick-up truck, at speeds in excess of the posted or legal speed limits and did thereby unlawfully and feloniously kill Lawrence John Pleasants by the operation of the aforesaid pick-up truck, the killing of Lawrence John Pleasants being the proximate result of his, the said Rickey E. Mitchell's, conduct creating a substantial risk of death or serious bodily injury to Lawrence John Pleasants under circumstances manifesting the said Rickey E. Mitchell's

extreme indifference to the value of human life, all in violation of Tennessee Code Annotated, Section 39-2-231.

On July 19, 1982, Petitioner filed a motion, as amended, to dismiss or quash the indictment and a motion to supress the evidence, alleging that after waiving his right to a jury trial and entering a guilty plea to the State charges of reckless driving and driving while intoxicated in the Municipal Court of Memphis, Tennessee, to try him again for the offense of vehicular homicide would place him in jeopardy, in violation of Article 1, Section 10, of the Constitution of the State of Tennessee and Amendments 5 and 14 to the Constitution of the United States of America.

Tennessee Code Annotated, Section 39-2-231, provides as follows:

> "39-2-231. Vehicular homicide. --Vehicular homicide is the killing of another by the operation of an automobile, airplane, motorboat or other motor vehicle:
>
> (a) As the proximate result of conduct creating a substantial risk of death or serious bodily injury to a person under circumstances manifesting extreme indifference to the value of human life; or
>
> (b) As the proximate result of the driver's intoxication as set forth in Section 55-10-401. For purposes of this section, 'intoxication' shall include alcohol intoxication as defined by Section 59-10-408, drug intoxication, or both."

Tennessee Code Annotated, Section 39-2-232, provides as follows:

> "39-2-232. Punishment for vehicular homicide. -- Whoever is convicted of vehicular homicide under the provisions of subsection (a) of Section 39-2-231 shall be imprisoned in the State penitentiary for a determinate sentence

which shall be fixed at a period of time not to exceed five (5) years. Whoever is convicted of vehicular homicide under the provisions of subsection (b) of Section 39-2-231, when intoxication of the driver is the proximate cause of death, shall be imprisoned in the state penitentiary for a determinate sentence which shall be fixed at a period of time not less than one year, not more than twenty-one years."

The Fifth Amendment of the Constitution of the United States states as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment of the Constitution of the United States of America states as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

* * *

Article 1, Section 10, of the Constitution of the State of Tennessee provides as follows:

> "Double Jeopardy Prohibited. - That no person shall, for the same offense, be twice put in jeopardy of life or limb."

On November 5, 1982, the Trial Court denied Petitioner's motion to dismiss, and an order was entered on November 12, 1982.

On November 15, 1982, the Trial Court granted Petitioner's Application for Permission to Appeal the Court's order pursuant to Rule 9, Tennessee Rules of Appellate Procedure and entered a Statement of Reasons.

On December 1, 1982, the Tennessee Court of Criminal Appeals granted Petitioner's Application pursuant to said Rule of Appellate Procedure.

On December 15, 1983, a majority of the Court of Criminal Appeals reversed the Trial Court's judgment and ordered the vehicular homicide indictment dismissed.

On January 14, 1984, the State of Tennessee filed its Application for Permission to Appeal, and on April 30, 1984, the Supreme Court of Tennessee granted the State's Application for Permission to Appeal.

On December 31, 1984, the Supreme Court of the State of Tennessee reversed the decision of the Tennessee Court of Criminal Appeals and affirmed the Trial Court's dismissal of Petitioner's plea of former jeopardy and remanded the case to the Shelby County Criminal Court for trial.

Your Petitioner alleges that he has presented to the Criminal Court of Shelby County, Tennessee, to the Court of Criminal Appeals of the State of Tennessee, and to the Supreme Court of the State of Tennessee lengthy briefs in support of his position, stating to to try him again for the offense of vehicular homicide after having been found guilty of the lesser included offense of driving while intoxicated, denies him of due

process under the Fifth and Fourteenth Amendments of the Constitution of the United States of America and Article 1, Section 10, of the Constitution of the State of Tennessee; thus, the application for writ of habeas corpus filed herein.

Petitioner cited and emphasized to the Honorable State Courts the many United States Supreme Court decisions which state that to try Petitioner for the offense of vehicular homicide after having been found guilty of the lesser included offense of driving while intoxicated violated not only the supreme law of the land, that is, the Constitution of the United States of America, but also violated the provisions of the Constitution of the State of Tennessee.

Petitioner has exhausted all remedies available to him under the Courts of the State of Tennessee, and he now seeks protection of this Honorable Court; thus, this Application for Writ of Certiorari.

Petitioner avers that he is entitled to a Writ of Habeas Corpus pursuant to the provisions of Title 28, United States Code Annoted, Section 2241, and other laws and statutes of the United States of America, now that the Supreme Court of the State of Tennessee has reversed the Tennessee Court of Criminal Appeals and remanded the case for trial.

-oOo-

ARGUMENT

Tennessee Code Annotated, Section 55-10-401, provides as follows:

> "55-10-401. Intoxicated or drugged persons prohibited from driving. -- (a) It shall be unlawful for any person or persons to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the State of Tennessee, or any streets or alleys, or while on the premises of any shopping center, trailer park, or any apartment house complex which is generally frequented by the public at large while under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system."

In the case of State of Tennessee v. McKenney, 605 S.W. 2d 842, Permission to appeal denied by Supreme Court on July 30, 1980, the Court stated that the offense of driving while intoxicated is a lesser included offense of vehicular homicide.

In the case of Robinson v. Neil, 366 F.Supp. 924, decided by the Eastern District of Tennessee on November 9, 1973, State prisoner, Neil, instituted habeas corpus proceedings seeking to set aside convictions and sentences. The United States District Court for the Eastern District of Tennessee, 320 F.Supp. 894, granted writ and appeal was taken. The United States Court of Appeals for the Sixth Circuit, 452 F.2d 370, reversed and certiorari was granted. The United States Supreme Court, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed 2d 29, vacated judgment of the Court of Appeals and remanded case. On remand, the District Court, Frank W. Wilson, Chief Judge, held that prisoner's conviction in municipal court of three offenses of assault and battery in violation of

ordinance barred, on double jeopardy grounds, subsequent prosecution in state courts for three assaults with intent to commit murder arising from the same occurrences.

This case cites all of the other relevant automobile former jeopardy cases herein referred to and states as follows:

> "As stated by Judge Miller in United States v. Engle, 458 F.2d at 1025 (6th Cir. 1972):
>
> > '(The double jeopardy clause) is intended to prevent vexatious, piecemeal prosecution whether the result of an intent to harrass, a desire to have more than one shot at obtaining a conviction or severe sentence, a mere prosecutorial caprice or carelessness.'
>
> If the State were allowed to initiate separate prosecutions against a defendant for every crime up the ladder from the lesser to the greater offense, the potential for abuse and oppression would be too great to be tolerated in a society

concerned for the rights of the individual. The double jeopardy clause stands as a bar to such a potential.

* * *

It is clear that the Constitution prohibits the trial of a person for an offense where he has been previously charged with and convicted of a lesser-included offense arising out of the same act or activity.

* * *

The decision reached herein does not impose an undue hardship on the State. It merely requires that the prosecution of individuals accused of criminal activities be managed in such a way that those individuals are not forced to climb a ladder of multiple criminal prosecutions from the 'least' included offense to the greatest. In this regard, any breakdown in communications between state and municipal officials forms no justification for depriving an accused person of his right to plead double jeopardy. See Waller v. Florida, supra. Thus the court concurs in the result reached in Hulberson v. Wainwright, 453 F.2d 1219 (5th Cir. 1972), cert.

denied, 407 U.S. 913, 92 S.Ct. 2449, 32 L.Ed. 2d 688 (1972), though not in its rationale."

The Supreme Court of the State of Tennessee, in reversing its Court of Appeals, relies heavily on the case of Diaz v. United States, 223 U.S. 442 (1912), because Lawrence John Pleasants died ten days after Petitioner pled guilty to the lesser offense of driving while intoxicated. The Sixth Circuit Court of Appeals affirmed the District Trial Court, applying the rationale in Diaz v. United States, and stated, " . . . and we know of no constitutional requirement that the trial on those charges be delayed for some indeterminate period while the authorities conduct a deathwatch at the bedside of the victim."

Your Petitioner sees no logic in such a ruling, as the Prosecutors in the Municipal Court were fully aware of the severity of the accident which brought about the death of the victim, and Petitioner should not be denied his constitutional protection of former jeopardy, as stated by Sixth Circuit Judge Miller in the Robinson v. Neil case.

In the case of State of New Jersey v. Russell P. Dively decided by the Supreme Court of New Jersey on April 14, 1983, 458 Atlantic Reporter, 2d Series, p. 502, Defendant was convicted, on conditional guilty plea, before the Superior Court. The Superior Court, Appellate Division, affirmed. Defendant's petition for certification was granted. The Supreme Court,

Schreiber, J., held that where in proceedings before municipal court defendant pled guilty to drunk driving, which included merged offenses of reckless driving and failure to keep right, double jeopardy clauses of State and Federal Constitutions precluded subsequent prosecution for causing death by auto, arising out of the same incident.

In the Dively case, the Court cited many of the celebrated Supreme Court cases such as United States v. Vitale, 447 U.S. 410; 100 S.Ct. 2260; 65 L.Ed 2d 228; Ashe v. Swenson, 397 U.S. 436; 25 L.Ed. 469; 90 S.Ct. 1189 (1970); Robinson v. Neil, 366 F.Supp. 924, 929 (E.D. Tenn. 1973); Waller v. Florida, 397 U.S. 387; 90 S.Ct. 1184; 25 L.Ed. 435 (1970); Roberts v. Thigpen, 468 U.S. --, 82 L.Ed. 2d 23, 104

S.Ct. --, decided by Supreme Ct. on June 27, 1984; and many other cases, both State and Federal. It is significant that the Dively case cited, with approval, the Tennessee case of Robinson v. Neil, supra.

In reversing and dismissing the case of death by auto, the Court stated as follows:

> "Accordingly, it is necessary that there be effective cooperation between the municipal court and the county prosecutor. We have no doubt that such cooperation will be forthcoming. We have heretofore directed that where a complaint is filed in the municipal court and the magistrate has reason to believe that the factual situation out of which the complaint arose may also involve an indictable offense, the matter should be referred to the county prosecutor. Municipal Court Bulletin Letter #96, February 20, 1964. We propose to bring this directive to all municipal court judges to withhold actions on drunk driving incidents involving personal

> injuries until clearance to proceed has been obtained from the county prosecutor. Where death occurs, we expect a drunk driver in the future to be charged with and tried for the greater offense of death by auto."

In the case of Morris Thigpen v. Barry Joe Roberts, supra, the facts in this case and the procedures taken are almost identical to the facts in the instant case:

> "On August 6, 1977, respondent Barry Joe Roberts lost control of his car and collided with a pickup truck, killing a passenger in the truck. Shortly after the accident, Roberts received citations for reckless driving, driving while his license was revoked, driving on the wrong side of the road, and driving while intoxicated. He was convicted of these four misdemeanors in a Justice of the Peace Court in Tallahatchie County, Mississippi. Roberts gave notice of appeal, and the case was transferred to the Circuit Court for trial de novo.
>
> While the appeal was pending, in December 1977, a grand jury

indicted Roberts for manslaughter based on the August 6 accident. App. 90-91. Roberts was arraigned on the appeals and the felony indictment simultaneously, and the five charges were set for trial together. App. 92-93. During the trial, the State elected not to press the misdemeanor charges and remand them to the file. The jury convicted Roberts of manslaughter, and the Judge sentenced him to twenty years in prison. The Mississippi Supreme Court affirmed. It also refused Roberts leave to pursue state post-conviction remedies.

Roberts then brought the present habeas corpus action in the United States District Court for the Northern District of Mississippi. The petition was referred to a Magistrate, who recommended that the writ issue for two reasons. First, the manslaughter prosecution violated the Double Jeopardy Clause because proof of manslaughter required proof of all the elements of reckless driving, of which Roberts had already been convicted. See Illinois v. Vitale, 447 U.S. 410, 65 L.Ed 228, 100 S.Ct. 2260 (1977). Second, substitution of a felony charge covering the conduct for which

> Roberts had already been convicted of four misdemeanors violated the Due Process Clause. See Blackledge v. Perry, 417 U.S. 21, 40 L.Ed. 628, 94 S.Ct. 2098 (1974). The District Court of Appeals for the Fifth Circuit was affirmed, relying solely on the double jeopardy argument."

In granting certiorari, the Supreme Court stated that the prosecution of Roberts for manslaughter, following his invocation of his statutory right to appeal his misdemeanor convictions, was unconstitutional, and the Court affirmed the Fifth Circuit Court of Appeals and ordered the Defendant released.

Please refer to the case of State of New Mexico, Petitioner vs. Charles Fugate, Respondent, 678 P.2d 687, decided by the Supreme Court of New Mexico on March 1, 1984.

In this case, Fugate was involved in a three-vehicle accident which caused great bodily harm, followed by death, to a passenger of one of the other cars. Fugate entered a plea of nolo contendere to charges of driving while intoxicated and careless driving in Municipal Court. He was found guilty and sentenced to alcohol treatment. Fugate was subsequently tried and convicted of homicide by vehicle in the District Court. Fugate appealed his conviction, claiming that the second trial was barred on double jeopardy grounds. The Court of Appeals reversed Fugate's conviction, and the State appealed to the Supreme Court of New Mexico which reversed the Court of Appeals. In this case, the victim had not died at the time of Fugate's

first prosecution in the Magistrate's Court. The Supreme Court of the United States granted certiorari and, by an equally-divided court, the judgment of the Supreme Court of New Mexico was affirmed. Four Justices stated former jeopardy; four Justices stated no former jeopardy.

While the Sixth Circuit distinguished the facts in the instant case with the statute in the Fugate case, Petitioner respectfully seeks review of his case bcause in the Fugate case, as in the instant case, the victim had not died at the time of Fugate's first prosecution in the Magistrate's Court; yet the Supreme Court granted certiorari. Petitioner believes that by granting its Writ of Certiorari in the Fugate case in a

four-to-four equally-divided court, the Court, in substance, is discounting the rationale of the Supreme Court of the State of Tennessee when it reversed its Court of Appeals ruling for the reasons set forth in the Diaz v. United States case.

The Tennessee Court of Appeals, in reversing and dismissing the indictment in this case against your Petitioner stated as follows:

> "The State correctly points out that there are some exceptions to Brown. We have considered them. The State argues that one exception may apply when all the events necessary to the greater crime have not taken place at the time the prosecution for the lesser is begun. See Jeffers v. United States, 432 U.S. 137, 150, 97 S.Ct. 2207, 2216, 53 L.Ed. 2d 168 (1977). However, the applicability of this exception is conditioned on prosecutorial exercise of due diligence before the first trial. Id. at 150, 153. In the case sub judice the

> record does not reflect what, if anything, required the hasty disposition of the case within forty-eight (48) hours following the offenses, and within the hospitalization period of the victim who died from his injuries ten (10) days later."

It just does not seem fair for the Court to subject your Petitioner to a possible sentence of 21 years in the penitentiary because of ". . . a mere prosecutorial caprice or carelessness", as stated by Judge Miller. The Municipal Trial Court should not have accepted Petitioner's guilty plea. Petitioner is now trapped. How do we know but what there might have been some impropriety in the manner in which a guilty plea was suggested to the Trial Court? If a trial had been demanded by Petitioner, who knows, maybe the Court or jury would have found him not guilty of

the offense of vehicular homicide, or maybe only driving while intoxicated. He only registered two percentage points above the presumption of intoxication on the intoximeter. How does Petitioner know whether or not the intoximeter was accurate? Now Petitioner is faced with a trial for vehicular homicide, and how can he defend himself? The Sixth Circuit Court of Appeals, in its judgment affirming the District Trial Court, stated as follows:

> "It may well be true, as counsel for Mr. Mitchell has earnestly submitted, that it will be difficult successfully to defend Mr. Mitchell at his vehicular homicide trial, given the earlier charges. The Constitution has not yet been interpreted to mean that every defendant is entitled to a successful defense, however, and any problems Mr. Mitchell's counsel may have at the homicide trial will not be the result of a violation of the Double Jeopardy Clause."

Now counsel for Petitioner finds himself in an awkward and in an almost impossible position to successfully defend Petitioner.

The guilty plea of Petitioner was a negotiated plea. To try him now for vehicular homicide requires him almost to testify against himself, in violation of the Fifth Amendment of the Constitution of the United States and causes him, in effect, "to be compelled to be a witness against himself". If he takes the witness stand, how can he overcome the plea of guilty that he entered in the Memphis Municipal Court? There is no way.

The Sixth Amendment to the Constitution of the United States states that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial. Surely the Federal Constitution intends for an accused to be given a fair trial, as well as a speedy trial. How then, in the circumstances, can Petitioner be given a fair trial?

CONCLUSION

For the foregoing reasons your Petitioner earnestly submits that the judgment of the Sixth Circuit Court of Appeals should be reversed and that Petitioner's Application For Writ of Habeas Corpus should be granted and that the indictment returned against him in the Criminal Court of Shelby County, Tennessee be dismissed.

Petitioner prays for such other relief as is mete and proper.

This the _____ day of May, 1986.

Respectfully submitted,

CHARLES G. BLACK, (8723)
Attorney for Petitioner
2901, 100 North Main Bldg.
Memphis, Tennessee 38103
(901) 525-4618

CERTIFICATE OF SERVICE

I, Charles G. Black, do hereby certify that I have served a copy of the foregoing Petition For a Writ of Certiorari on the Honorable W. J. Michael Code, Attorney General of the State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee 37219; and to the Honorable Hugh W. Stanton, Jr., District Attorney General for the Thirtieth Judicial Circuit of Memphis, 201 Poplar Avenue, #301, Memphis, Tennessee 38103, via United States mail, postage prepaid on this the ____ day of May, 1986.

CHARLES G. BLACK

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-5603

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RICKEY E. MITCHELL,
Petitioner-Appellant,

v.

W. J. MICHAEL CODY, ATTORNEY GENERAL OF THE STATE OF TENNESSEE, et al.,
Respondents-Appellees.

ON APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed February 18, 1986

Before: MERRITT, JONES and NELSON, Circuit Judges.

PER CURIAM. Petitioner Mitchell, who is facing trial for vehicular homicide in a state court in Tennessee, here appeals from a federal district court order denying his application for a writ of habeas corpus. Having already been tried on a lesser charge in connection with the motor vehicle accident that ultimately led to his being indicted for homicide, Mr. Mitchell argues that if Tennessee were to try him again it would violate the constitutional prohibition against double jeopardy. Finding that this case comes within the "necessary facts" exception to the general rule prohibiting successive

prosecutions for a lesser offense and an offense that includes it, we affirm the denial of a writ of habeas corpus.

I

The accident occurred on February 20, 1982, when Mr. Mitchell, who had been drinking, drove his pickup truck through a stop sign and hit an automobile driven by a Mr. Pleasants. Mr. Pleasants was badly injured. Mr. Mitchell was found to have a blood alcohol level of .12, and valium was discovered in his possession.

A state warrant was issued, and two days after the accident Mr. Mitchell appeared in the Municipal Court of Memphis and pleaded guilty to charges of driving while intoxicated, possession of a controlled substance, and disregarding a stop sign. A charge of reckless driving was dismissed. Mr. Mitchell was found guilty, fined, and given a 60 day jail sentence, with 58 days suspended.

Ten days later Mr. Pleasants died.

Mr. Mitchell was thereafter indicted by a Tennessee grand jury for unlawfully and feloniously killing Mr. Pleasants by the operation of a motor vehicle, in violation of Tennessee Code Annotated § 39-2-231(b). Mr. Mitchell moved to quash the indictment on the ground that because he had pleaded guilty to charges arising out of the February 20 accident it would be a violation of the double jeopardy clauses of the federal and state constitutions to try him again.

The trial court denied the motion to quash, and Mr. Mitchell perfected an interlocutory appeal to the Tennessee Court of Criminal Appeals. That court reversed, by a vote of two to one, and the state appealed to the Tennessee Supreme Court. The Supreme Court reversed the decision of the Court of Criminal Appeals, affirmed the trial court's dismissal of the double jeopardy plea, and remanded the case for trial. Mr. Mitchell then sought and was denied federal habeas corpus relief.

II

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, which is now held to bind the states by reason of the Fourteenth Amendment, says that no person shall be subject to be put in jeopardy of life or limb twice "for the same offence." The statutory definition of the offense for which Mr. Mitchell has been indicted, vehicular homicide, is couched in terms of "the killing of another by the operation of an automobile . . . ." The "killing of another" is not an element of the offenses of which Mr. Mitchell was convicted on February 22, 1982. Mr. Mitchell could not have been charged with vehicular homicide on or before February 22, 1982, because Mr. Pleasants was still alive at that time. As the United States Supreme Court recently reiterated, "[s]uccessive prosecutions are barred by the Fifth Amendment only if the two offenses for which the defendant is prosecuted are the 'same' . . . ." *Heath v. Alabama*, 474 U.S. _, _, 88 L.Ed.2d 387, 393, 106 S.Ct. _, _ (1985).

Mr. Mitchell's plea of double jeopardy would doubtless have been well taken if Mr. Pleasants had died before February 22, because the charges to which guilty pleas were interposed would have constituted lesser offenses included within the offense of vehicular homicide. The Double Jeopardy Clause generally forbids prosecution for a greater offense after prosecution for a lesser included offense. *Brown v. Ohio*, 432 U.S. 161 (1977).

There is, however, a well recognized exception to the general prohibition against prosecuting a defendant for a greater offense after he has already been tried for a lesser included offense. As the Supreme Court of Tennessee explained in the case at bar, speaking in a unanimous decision written by the Chief Justice, the exception to the general rule applies, and prosecution for the greater offense is allowed, "when an element of the greater offense has not occurred at the time of the prosecution for the lesser offense . . . ." *Tennessee v.*

Mitchell, 682 S.W.2d 918, 920 (Tenn. 1984). The Tennessee court followed *Diaz v. United States*, 223 U.S. 442 (1912), where the United States Supreme Court held that it was not a violation of the double jeopardy provision of a federal statute governing the Philippine Islands for Mr. Diaz to be placed on trial for homicide after the death of a person for whose assault Mr. Diaz had been tried before the victim died. There is no reason to suppose that *Diaz* is not good law today; see *Garrett v. United States*, 471 U.S. __, 85 L.Ed. 2d 764 (1985), where Justice Rehnquist, who delivered the opinion of the Court, quoted and applied the following language from *Diaz*:

> "The death of the injured person was the principal element of the homicide, but was no part of the assault and battery. At the time of the trial for the latter the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense."

85 L.Ed. 2d at 779, (quoting *Diaz*, 223 U.S. at 449).

There is nothing inconsistent with this in *New Mexico v. Fugate*, 678 P.2d 710 (N.M. Ct. App. 1983), where operative facts analagous to those in the case at bar were dealt with under a state criminal statute radically different from the Tennessee statute involved here. Like Mr. Mitchell, Mr. Fugate was convicted in a municipal court of careless driving and driving while under the influence of alcohol. After his conviction, one of the people who had been injured in the accident died. Charges of death-by-vehicle were then brought against Mr. Fugate in a state district court. The New Mexico Court of Appeals held that the *Diaz* "necessary facts" exception to the rule of *Brown v. Ohio* did not apply, because a single New Mexico statute "condemns both death-by-vehicle and great-bodily-injury-by-vehicle, and imposes the same penalty for either violation." 678 F.2d at 711. "It is equally undisputed," the Court of Appeals explained, "that either offense . . . can only be committed by reckless driving or by

DWI." Because Mr. Fugate was tried on a DWI charge in municipal court as an outgrowth of the same accident that later resulted in a homicide charge in district court, "he cannot be tried again of a charge requiring proof of the identical conduct upon which he has already been convicted." As the Court pointed out at 678 P.2d 712,

> "The State had nothing to lose by filing 'great-bodily-injury' charges in district court at the time of the accident upon the facts . . . known [at the time Mr. Fugate was charged in municipal court]. Under those circumstances, no reliance on the 'necessary facts' exception of *Diaz*, upon which rests excuse from filing the death-by-vehicle charges at the time, would have been required. Sufficient facts already were known to permit the filing of the alternative offense of great-bodily-injury-by-vehicle under the same statute; that charge would have borne the same felony conviction and the same felony penalty as would conviction of the alternative statutory offense of death-by-vehicle."

Stated otherwise, the Court of Appeals concluded "there was no absence of 'necessary facts' which would have preserved the charge of death-by-vehicle from the prohibition of double jeopardy." *Id.*

On appeal to the Supreme Court of New Mexico, the decision of the Court of Appeals was reversed under the "jurisdictional" exception to the general rule on double jeopardy. The New Mexico Supreme Court thus did not reach the "necessary facts" question, but observed by way of dictum that "[t]he Court of Appeals opinion in *Fugate* concerning the necessary facts exception is . . . proper and correct." *New Mexico v. Padilla*, 101 N.M. 58, _, 678 P.2d 686, 687 (1984), *aff'd per curiam*, _ U.S. _, 105 S.Ct. 1858 (4-4 decision) (1985). (See *Heath v. Alabama*, 474 U.S. _, 88 L.Ed.2d 387, 106 S.Ct. 433 (1985), for a subsequent application of the dual sovereignty doctrine.)

BEST AVAILABLE COPY

Unlike the New Mexico criminal code, the Tennessee Code deals with vehicular homicide in isolation, designating it as a singular offense that cannot be charged without the actual killing of another. *Fugate* is thus inapposite here.

The Tennessee Court of Appeals held in this case that the "necessary facts" exception did not apply because "the applicability of this exception is conditioned on prosecutorial exercise of due diligence *before the first trial.* [Citing *Jeffers v. United States,* 432 U.S. 137, 150, 153 (1977).] In the case *sub judice* the record does not reflect what, if anything, required the hasty disposition of the case within forty-eight (48) hours following the offenses, and within the hospitalization period of the victim who died from his injuries ten (10) days later."

In rejecting this conclusion, the Tennessee Supreme Court declared that the "necessary facts" exception "does not require a showing of due diligence." In this context, at least, we fully agree. Although nothing is so certain as death, nothing is so uncertain as the hour thereof. Mr. Mitchell was entitled to a speedy trial on the original charges, and we know of no constitutional requirement that the trial on those charges be delayed for some indeterminate period while the authorities conduct a deathwatch at the bedside of the victim.

It may well be true, as counsel for Mr. Mitchell has earnestly submitted, that it will be difficult successfully to defend Mr. Mitchell at his vehicular homicide trial, given Mr. Mitchell's plea of guilty on the earlier charges. The Constitution has not yet been interpreted to mean that every defendant is entitled to a successful defense, however, and any problems Mr. Mitchell's counsel may have at the homicide trial will not be the result of a violation of the Double Jeopardy Clause. That clause does not apply here, and the judgment of the United States District Court is therefore **AFFIRMED.**